

STATE OF MICHIGAN  
COURT OF APPEALS

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ROBERT AUSLANDER and CAROL  
AUSLANDER,

UNPUBLISHED  
May 1, 2007

Plaintiffs-Appellees,

v

ALLAN W. CHERNICK, M.D.,  
CARDIOVASCULAR SPECIALISTS, P.C.,  
HOWARD S. GOLDBERG, M.D., and HOWARD  
S. GOLDBERG, M.D., P.C.,

No. 274079  
Oakland Circuit Court  
LC No. 2004-061286-NH

Defendants-Appellants.

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Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

After this Court denied defendants' application for leave to appeal in Docket No. 267705, our Supreme Court remanded the case to this Court for consideration as on leave granted. *Auslander v Chernick*, 477 Mich 922; 722 NW2d 888 (2006). Defendants challenge a circuit court order that denied their motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10) in this medical malpractice case where plaintiffs' counsel inadvertently failed to attach affidavits of merit to the complaint. The trial court concluded that defendants waived any statute of limitations defense because they failed to plead the facts supporting the defense in their answer. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs' complaint, filed September 23, 2004, alleged medical malpractice resulting in a myocardial infarction on March 21, 2003. Contrary to MCL 600.2912d, the complaint was not accompanied by an affidavit of merit.

In defendants' affirmative defenses, they asserted that plaintiffs' claim was "barred by the statute of limitations as it applies to malpractice actions." The affirmative defenses also included the following:

Plaintiff's [sic] Affidavit of Merit fails to meet the requirements of MCL §600.2912a; MCL §600.2912d, and other provisions as set forth in the Tort Reform Acts of 1993 and 1995. . . .

On November 17, 2004, plaintiffs filed a reply to the affirmative defenses that included discovery requests regarding the defenses. Plaintiffs requested that defendants either admit under MCR 2.312 that plaintiffs had complied with the applicable statute of limitations or, pursuant to MCR 2.309, disclose “each and every way that the Defendant [sic] claims that the plaintiff [sic] has failed to fully comply with the statute of limitations.”

In defendants’ December 8, 2004, response to this request, they asserted:

1. In response to paragraph 2, Defendants deny that Plaintiffs have complied with the statute of limitations. Plaintiffs have failed to comply with MCL 600.2912(d) [sic, 600.2912d].

Plaintiffs also requested that defendants either admit that plaintiffs had complied with MCL 600.2912d or disclose under MCR 2.309 “each and every way that the Defendants claim that the Plaintiff [sic] has failed to comply with MCL 600.2912d, including but not limited to any alleged defects.” Defendants responded:

2. In response to paragraph 21, Defendants state that Plaintiffs failed to file with the complaint an affidavit of merit signed by a health professional who the Plaintiffs’ attorney reasonably believes meets the requirements for an expert witness as required by MCL 600.2912(d)(1) [sic].

After the limitations period expired, defense counsel requested “a time-stamped copy of the Affidavits of Merit filed with the Complaint . . . .” Plaintiffs then filed two affidavits of merit that were notarized on March 2 and 15, 2004, several months before the complaint was filed.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), and argued, in part, that plaintiffs failed to file the affidavits of merit with the complaint. In response, plaintiffs argued that pursuant to MCR 2.111(F)(3)(b), defendants were required to state the facts forming the basis for its affirmative defenses, but failed to do so, and therefore, the defense was waived pursuant to MCR 2.111(F)(2).

The trial court agreed with plaintiffs that defendants had failed to adequately plead the facts supporting the defense.

MCR 2.111(F)(3) requires a party to plead the facts which support a defense of statute of limitations, or any other defense which would be likely to take the opposing party by surprise. Had defendants pled the facts supporting their statute of limitations defense, the plaintiffs could simply have amended or refiled their complaint within the limitations time period. The defendants’ tactic of not pleading their facts and then waiting for the statute of limitations to expire before filing the motion demonstrates that this is a defense which is likely to take the plaintiff by surprise.

The court will not exalt form and procedure over justice on the merits at the plaintiff’s expense while ignoring the defendants’ own procedural lapses. Defenses not pled in conformity with the rules are waived. MCR 2.111(F)(2).

The defenses relating to the sufficiency of the affidavits are waived for the defendants' failure to plead sufficient facts as to reasonably inform the plaintiffs of the basis for these defenses.

On appeal, defendants argue that the trial court erred in ruling that they waived their defenses relating to plaintiffs' failure to file affidavits of merit. They contend that their affirmative defenses were comparable to those deemed sufficient in *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005).

This Court reviews a trial court's order denying summary disposition de novo. That standard of review is also applicable to issues involving the interpretation and application of court rules and statutes, which present questions of law. *Associated Builders & Contractors v Director of Consumer & Industry Services Director*, 472 Mich 117, 123-124; 693 NW2d 374 (2005).

In *Burton, supra*, the plaintiff prematurely filed the complaint by filing it 115 days after providing the statutory notice of intent to sue. MCL 600.2912b(1). The affirmative defenses included that the plaintiff's claim "is barred by the applicable Statute of Limitations," and "[T]hat plaintiff has failed to comply with the provisions of MCLA 600.2912b and MCLA 600.2912d, *et seq*[]" and plaintiff's complaint must, therefore, be dismissed." The Supreme Court rejected the argument that the defendants waived their defense by waiting until after the period of limitations had expired before bringing their motion for summary disposition.

In the present case, the specific defect was plaintiffs' failure to attach any affidavits of merit to the complaint. Defendants' affirmative defense was *not* that plaintiffs "had failed to comply with the provisions of MCL 600.2912d," which would be comparable to the defense in *Burton*. Rather, the defense was that

[p]laintiff's [sic] Affidavit of Merit fails to meet the requirements of MCL §600.2912a; MCL §600.2912d, and other provisions as set forth in the Tort Reform Acts of 1993 and 1995.

The asserted defense is not simply devoid of facts underlying the defense. It is contrary to the facts because it indicates the existence of an affidavit that did not comply with the statute, when in fact no affidavit had been filed. For this reason, we conclude that *Burton* is distinguishable and does not compel reversal of the trial court's decision.

Defendants also argue that their discovery responses were not misleading, and that plaintiffs just assumed incorrectly. Defendants argue that plaintiffs could have moved for a more definite statement if they believed the discovery answer was unclear. Regardless of whether defendants' responses were misleading, however, that was not the basis of the trial court's ruling. Rather, the trial court's decision was based on MCR 2.111(F)(2) and (3).

Defendants also contend that in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000), and *Burton, supra*, the Supreme Court rejected the argument that a failure to plead that a plaintiff did not file an affidavit of merit may relieve a plaintiff of the obligation to do so. Defendants argue that *Scarsella* establishes that compliance with MCL 600.2912d is mandatory, such that the affidavit-of-merit requirement cannot be waived by a defendant.

The decisions cited by defendants do not support their position. *Scarsella* indicates that a complaint in a medical malpractice action that is not accompanied by an affidavit of merit as required by MCL 600.2912d is insufficient to commence the action and does not toll the period of limitation. *Scarsella* does not discuss a party's obligation to plead affirmative defenses. In *Burton*, the Court concluded that the defendants did not waive the defenses of statute of limitations and the plaintiff's noncompliance with MCL 600.2912b, which the Court likened to MCL 600.2912d(1). *Burton, supra*, pp 753-754. The Court did *not* conclude that noncompliance with MCL 600.2912b could not be waived. Instead, the Court concluded that waiver was not shown under the circumstances of that case, but suggested that waiver may be shown in other circumstances. *Id.*, pp 754-755.

Defendants have not shown that the trial court erred in finding that defendants failed to comply with MCR 2.111(F)(3) and thereby waived their defenses pursuant to MCR 2.111(F)(2).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Stephen L. Borrello